17th June 1745.

ANSWERS

FOR

ANNE Counteſs of *Ruglen* and *WILLIAM* Earl of *March*,

TO THE

PETITION of Lord *Archibald Hamilton.*

THE Scope and Prayer of the Petition, is, That your Lordſhips ſhould Proceed in the Cauſe depending before your Lordſhips, at the Inſtance of the Petitioner, againſt the deceaſt *John* Earl of *Selkirk*, to a final Determination of ſuch Particulars in the ſaid Action as are yet in Dependence: And as your Lordſhips have ordained this Petition to be anſwered, the Reſpondents will ſhortly State the Situation of the Petitioners Action, that ſo your Lordſhips may be able to determine, whether the Action can be properly proceeded in; that is, if there are proper Parties in Court, between whom the depending Action may be determined.

The Fact is, That the Petitioner brought an Action againſt the deceaſt *John* Earl of *Selkirk* and *Ruglen*, containing the following Concluſions, *viz. Firſt*, That the Defender ſhould convey in Favours of the Petitioner and certain Subſtitutes, the Eſtate of *Riccartoun*, &c. and the Lands of *Eliſtoun*. *Secondly*, That the ſaid deceaſt Defender ſhould accompt for his Intromiſſions with Rents of the foreſaid Lands, from the Death of *Charles* Earl of *Selkirk*, and pay in the ſame to the Purſuer. *Thirdly*, That the ſaid deceaſt Defender, ſhould pay to the Purſuer, the half of the Sum of 5000 *l.* as the Proviſions made to the Defender by the Duke and Dutcheſs of *Hamilton* his Father and Mother, and received by the Defender before he ſucceeded to his Brother *Charles* Earl of *Selkirk*. And *4to*, That the Defender ſhould pay a certain Sum in Name of Damage and Expence of Proceſs. Theſe are the Concluſions of the Petitioner's Action, that are ſtill in Dependence before your Lordſhips; and which the Petitioner inſiſts ſhould now be determined.

With reſpect to the whole Concluſions, the Reſpondents muſt ſubmit it to your Lordſhips, if it is at all competent for your Lordſhips to hear and determine the ſame after the Defender is dead; and when there is no Defender in Court; the Reſpondents believe this could not be a Queſtion, if no Appeal to the Houſe of Lords had interveened; that the Death of the Defender, *John* Earl of *Selkirk*, would have put an End to the Action, and ſtopt all Procedure until his Repreſentatives were called, and the Action transferred againſt them; and therefore, if the Appeals do not vary the Caſe, with reſpect to the Subjects in Dependence, and neither determined nor appealed againſt, as the Reſpondents are adviſed they do not, as ſhall be explained more fully in the Sequel, they apprehend that your Lordſhips cannot proceed to determine the Queſtions in Dependence; but that the Prayer of the Petition ought to be refuſed, in reſpect the Defender is dead, and his Repreſentatives are not called, nor brought into Court.

More particularly with reſpect to the firſt Concluſion of the Petitioner's Libel, the Defender's conveying the Lands of *Riccartoun*, *&c.* and the Lands of *Eliſtoun*, in favours of the Petitioner, the Reſpondents apprehend, the Action was very competently brought againſt the Defunct, who was in the Right of the Lands, by virtue of the Diſpoſitions by his Father and Mother the Duke and Dutcheſs of *Hamilton*, and who was in Condition and had Power to convey, if it was found by your Lordſhips, that he was bound ſo to do; but as, by the Inveſtiture of theſe Lands, they were deſcendible to the Defender's Heirs-male therein mentioned, and not to the Reſpondent the Counteſs of *Ruglen*

glen and *March*, and her Sister the Countess of *Cassils*, it is not easily to be comprehended how the Respondents can be made Parties to this Conclusion: But if the Petitioner intends to have a Decree upon this Conclusion of his Libel, if such a Conclusion is at all now competent, he must have other Defenders, and possibly this Conclusion must now be varied; and how this can be done when the Defender is dead, and no other Defender called, is not obvious to the Respondents. Tho' the Petitioner had obtained a Decree decerning the Defunct to denude, and to convey, to execute a Conveyance settled by the Court, yet this Decree could not be carried into Execution against the Defunct's Heir in the Lands, without a new Action, wherein they behoved to be called: How much less can such a Decree be pronounced against the Respondents, and be carried into Execution against them, without calling them, especially that, for ought appears, they neither are nor can be Heirs in these Lands.

As to the *second* Conclusion, The accompting for paying in the Rents of *Riccartoun*, &c. to the Petitioner. No Doubt this Conclusion was very competent against the Defunct, upon the Supposition that he intromitted with the Rents: But now after the Defender's Death, how this Accompt should be institute against the Respondents, who are not made Parties to the Suit, or how a Decree should go against them for Payment, would need some further Explanation. Especially,

When 'tis added, that it appears from the Procedure before your Lordships, That, at least, Part of those Rents were intromitted with by the Earl of *Cassils*, and that he is accomptable for the same; and consequently tho' the Respondents were called and sisted in Court, and further tho' it were proved, that they were subject to the deceast Earl's Debts primarily, yet this Accompt could never be instituted with the Respondents, for Rents for which the Earl of *Cassils* only is answerable.

And on this Head, the Respondents must observe, That as no Appeal was brought with Respect to the Conveyance of the Lands of *Riccartoun*, nor with Respect to the bygone Rents, the present Question cannot be influenced by the Appeals brought by any of the Parties; and as this Conclusion could not have been insisted in against the Respondents, upon the Defender the Earl of *Selkirk* and *Ruglen*'s Death, without calling them, so it cannot now be insisted in, when they are not called.

And as to the third Conclusion, the Payment of the Half of the Defender's Provision. It was found by your Lordships, that the Defunct was bound to pay one Half of the Sum of 20,000 *l.* to the Petitioner; and upon an Appeal brought by the Respondents, this Interlocutor was affirmed. This Decree of the House of Peers makes this Interlocutor final, that is, that the Defunct was bound to pay this Sum, but is goes no further: But upon this Interlocutor no Decree can go against the Respondents, when they are not called, and when there is no Conclusion in the Libel, in the depending Action against them. The Decree of the House of Peers leaves the Matter as it was before the Court of Law, it affirms or reverses their Judgments, and further it goes not; and tho' one may be found to have sufficient Interest to bring an Appeal, or to defend in an Appeal, where they were not Parties to the Suit below; and this Appearance will have the Effect to make the Decree of the House of Peers final against the Parties appearing, yet it will have no further Effect against them, than the original Judgment appealed against would have had; and where the original Judgment could not be carried into Execution against them without a new Suit, neither will the Affirmance of the Judgment make it a Judgment against the Party appearing, nor warrant any Execution against him, without a Suit brought against him. A Party may have sufficient Interest to obtain the Reversal of a Decree, tho' he may not be liable to implement the Decree complained against.

And as to the *fourth* Conclusion, the Article of Damage and Expence, as no Judgment was given upon this Article during the Life of the Defender, nor was there any Appeal touching the same, the Action must stop by the Death of the Defender, and no further Procedure can be had upon it until a new Defender is sisted.

In Respect whereof the Desire of the Petition ought to be refused.

RO. CRAGIE.